

Healthcare Reform Digest:

What's next for the Affordable Care Act?



On November 10, 2020, the Supreme Court is expected to hear oral arguments in the case of California v. Texas. This case will once again ask the court to consider whether the Affordable Care Act (ACA) is constitutional. A cornerstone of the ACA is the requirement that all Americans have health insurance (typically called the individual mandate). A tax (also called a penalty) was created to enforce that provision. The individual mandate and penalty were previously upheld by the Supreme Court in 2012.

In 2017, Congress enacted the Tax Cuts and Jobs Act of 2017, which reduced the penalty for not having health insurance to \$0. As a result of that law, Republican officials in 20 states filed a lawsuit claiming that the individual mandate is unconstitutional because of the elimination of the penalty. A federal district court in Texas agreed and decided that since the mandate was central to the ACA, the entire law was unconstitutional. An appellate court agreed that the mandate is unconstitutional due to the elimination of the penalty but asked the lower court to reconsider whether the rest of the ACA could remain in effect – in other words, whether the mandate could be severed from the rest of the law. Democrats in 21 states filed an appeal to the Supreme Court, which is now being asked to answer those questions.

So, what happens now?

In addition to the core issue of the constitutionality of the individual mandate, the court will first have to decide whether the parties (the Republican and Democratic officials who brought the cases) have the right, also known as standing, to sue at all. The court could decide that the parties do not have standing and, in that case, may not consider the substantive question of constitutionality of the ACA.

Assuming the court does consider the question of constitutionality, there are several possible outcomes:

1. Find the mandate constitutional and uphold the ACA.
2. Find the mandate unconstitutional and conclude that the mandate cannot be severed from the law, resulting in the entire ACA being found unconstitutional.
3. Find the mandate unconstitutional but determine that the mandate can be severed from the ACA. In this scenario, the court could decide which provision(s) can stand without the mandate or could send the case back to the lower court to decide.

In addition to these possible outcomes, given the ongoing confirmation hearings for a new Supreme Court Justice to replace the late Justice Ruth Bader Ginsburg, it is possible that the court will only have eight associate justices at the time of oral arguments. As a result, there is a potential for the decision to be a split decision or a tie. In that case, the decision of the appellate court would be upheld, and the case would be sent back to the lower court to consider the issue of severability further. The court could also delay the oral argument until there are nine associate justices, or re-hear oral arguments once the ninth associate justice is sworn in.

If the ACA is found to be unconstitutional, when would the decision take effect?

A decision is not expected from the Supreme Court until mid-2021. If the court finds that the ACA is unconstitutional, the implications are significant across the healthcare system. Many Americans have coverage through Medicaid expansion and the availability of federal subsidies that help pay for coverage in the individual market. Considering the significant potential for disruption, the court could allow for some transition period during which the ACA can be unwound or that Congress could act to amend or replace the ACA. Without such an action by the court, the decision would be effective immediately.

What is the impact to Rhode Island?

Rhode Island has taken steps to incorporate many, but not all, ACA provisions into state law. Some examples include:

- Coverage for dependents until age 26
- Requirements to cover individuals even if they have a pre-existing condition
- State shared responsibility requirement (also known as an individual mandate)
- Parity in coverage for mental health and substance use disorder treatment
- Rate review processes

In addition, Rhode Island expanded eligibility for Medicaid. Without the Medicaid expansion, federal subsidies and other mechanisms, such as the risk adjustment program, to make health insurance more affordable there is a risk that many Rhode Islanders will become uninsured or that some insurers will stop covering services that are required to be covered under the ACA.

Blue Cross & Blue Shield of Rhode Island & The ACA

One thing is certain: Healthcare is a dynamic and constantly changing industry. Whatever the Supreme Court's decision, efforts to improve access to high quality affordable healthcare must continue in earnest. Blue Cross & Blue Shield of Rhode Island has long supported the ACA, especially the essential principle of the law: All individuals should have access to insurance, regardless of whether they have a pre-existing condition. We also recognize the importance of access to preventive care without cost-sharing. The ACA subsidies that many Rhode Islanders receive to help pay for insurance coverage in the individual market and the risk adjustment program have been instrumental in making insurance coverage more affordable. We hope others will join us in building on lessons learned during the past ten years to continue improving the health of Rhode Islanders while addressing affordability, quality and access to care, especially for those in underserved communities.